

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 143 w/CS Land Development Regulations

SPONSOR(S): Barreiro

TIED BILLS: **IDEN./SIM. BILLS:** SB 162

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Local Affairs (Sub)</u>	<u>9 Y, 0 N</u>	<u>Mitchell</u>	<u>Cutchins</u>
2) <u>Local Government & Veterans' Affairs</u>	<u>17 Y, 0 N w/CS</u>	<u>Mitchell</u>	<u>Cutchins</u>
3) <u>Judiciary</u>	<u></u>	<u>Thomas</u>	<u>Havlicak</u>
4) <u></u>	<u></u>	<u></u>	<u></u>
5) <u></u>	<u></u>	<u></u>	<u></u>

SUMMARY ANALYSIS

This bill adds a new subsection to section 163.3167, Florida Statutes, which is part of the Local Government Comprehensive Planning and Land Development Regulation Act. This new subsection relates to development orders that have been granted by a local government pursuant to its land development regulations.

Provided the approved development order is not the subject of a pending appeal and the timeframe for filing an appeal has expired, this bill provides that the development order is not invalid in the event that a court determines that the land development regulations, under which the development order was approved, are deficient.

The bill specifically does not preclude or affect the timely institution of any other remedy available at law or equity, including a writ of certiorari. The bill also does not affect an original proceeding filed pursuant to section 163.3215, Florida Statutes, which allows an "aggrieved and adversely affected party" to challenge any decision of local government granting or denying an application for a development order "which materially alters the use or density or intensity of use on a particular piece of property, on the basis that it is not consistent with the comprehensive plan."

The bill applies retroactively to any development order granted on or after January 1, 2002.

The bill takes effect upon becoming law.

The bill does not appear to have a fiscal impact on state or local government.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: h0143c.ju.doc

DATE: March 22, 2004

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

- | | | | |
|--------------------------------------|------------------------------|-----------------------------|---|
| 1. Reduce government? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. Lower taxes? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. Expand individual freedom? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. Increase personal responsibility? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. Empower families? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a “no” above, please explain:

B. EFFECT OF PROPOSED CHANGES:

Part II of Chapter 163, Florida Statutes, contains the Local Government Comprehensive Planning and Land Development Regulation Act. Section 163.3167, Florida Statutes, sets forth the scope of this act – including setting forth the powers and responsibilities of municipalities and counties and requiring local governments to prepare and submit a comprehensive plan.

This bill adds a new subsection to section 163.3167, Florida Statutes. This new subsection relates to development orders that have been granted by a local government pursuant to its land development regulations.

As provided in section 163.3164(23), Florida Statutes, land development regulations are "ordinances enacted by governing bodies for the regulation of any aspect of development and include any local government zoning, rezoning, subdivision, building construction, or sign regulations or any other regulations controlling the development of land." A development order is defined in section 163.3164(7), Florida Statutes, as "any order granting, denying, or granting with conditions an application for a development permit."

Provided the approved development order is not the subject of a pending appeal and the timeframe for filing an appeal has expired, this bill provides that the development order is not invalid in the event that a court determines that the land development regulations, under which the development order was approved, are deficient.

The bill specifically does not preclude or affect the timely institution of any other remedy available at law or equity, including a writ of certiorari.¹ It also does not affect an original proceeding filed pursuant to section 163.3215, Florida Statutes, which allows an “aggrieved and adversely affected party” to challenge any decision of local government granting or denying an application for a development order “which materially alters the use or density or intensity of use on a particular piece of property, on the basis that it is not consistent with the comprehensive plan.”

The bill applies retroactively to any development order granted on or after January 1, 2002.

¹ A writ of certiorari is issued by a court and it directs a lower court or decision-making body to deliver the record in the case for its review. See *Black’s Law Dictionary* (7th ed. 1999).

Miami-Dade County v. Omnipoint Holdings Inc.

This legislation is directed at the problems created as a result of the decision in *Miami-Dade County v. Omnipoint Holdings Inc.*² In that decision, the Third District Court of Appeal found two sections of the Miami-Dade County Code relating to zoning unconstitutional since these sections did not provide objective criteria to guide the zoning board in making a decision. As a result of this decision, Miami-Dade County "canceled most zoning hearings, saying its authority to approve new projects was in doubt."³ The decision also led to concerns as to how courts would treat projects which had been approved under the invalid zoning code.

Subsequently, the Florida Supreme Court reiterated the standards district courts of appeal should use for this type of "second-tier" certiorari review and held that the Third District Court of Appeal exceeded the proper scope of its review when it held the provisions of the zoning code facially unconstitutional.⁴ The Florida Supreme Court quashed, or voided, the decision of the Third District Court of Appeal and instructed it to review the case again.⁵ The Third District Court of Appeal then issued another opinion which, as directed by the Florida Supreme Court, did not address the constitutionality of the zoning code.⁶

C. SECTION DIRECTORY:

Section 1: Amends section 163.67, Florida Statutes, relating to the scope of the Local Government Comprehensive Planning and Land Development Regulation Act.

Section 2: Provides that the bill will take effect upon becoming law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

There are no known or expected fiscal impacts on state government revenues.

2. Expenditures:

There are no known or expected fiscal impacts on state government expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

There are no known or expected fiscal impacts on local government expenditures.

² 811 So. 2d 767 (Fla. 3d DCA 2002).

³ Douglas Hanks III, *Suit Seeks to Restart Zoning Process*, The Miami Herald, January 22, 2003, 2003 WL 2572627; see also Douglas Hanks III, *Doubt Clouds Zoning Appeal*, The Miami Herald, June 3, 2003, 2003 WL 20218173 and 2003 WL 57347692 (describing the zoning process in Miami-Dade County as "paralyzed...as county staffers rushed to add details to the building rules").

⁴ See *Miami-Dade County v. Omnipoint Holdings, Inc.*, 863 So.2d 195 (Fla. 2003).

⁵ See *id.*

⁶ See *Miami-Dade County v. Omnipoint Holdings, Inc.*, 863 So.2d 375 (Fla. 3d DCA 2003).

2. Expenditures:

There are no known or expected fiscal impacts of local government revenues.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

There is no per se direct economic impact on the private sector, but the bill seeks to provide certainty once development orders are granted by a local government as this certainty is important for the financing of development projects.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take action requiring the expenditure of funds, does not appear to reduce the authority that counties or municipalities have to raise revenue in the aggregate, and does not appear to reduce the percentage of state tax shared with counties or municipalities.

2. Other:

Access to Courts

Article I, section 21 of the Florida Constitution provides: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." The bill is drafted to preclude challenges to existing final development orders based on subsequent litigation which finds the underlying land use regulations deficient. To the extent the bill eliminates court actions which may be brought under current law in these situations, the bill may limit a certain avenue of access to the courts.

In *Kluger v. White*,⁷ the Florida Supreme Court considered the Legislature's power to abolish causes of action. The court determined that the statute at issue violated the access to courts provision of the state constitution, holding that where a right to access the courts for redress for a particular injury predates the adoption of the access to courts provision in the 1968 state constitution, the Legislature cannot abolish the right without providing a reasonable alternative unless the Legislature can show (1) an overpowering public necessity to abolish the right and (2) no alternative method of meeting such public necessity.⁸

Due Process and Retroactive Application

The bill applies the legislation retroactively to any development order granted on or after January 1, 2002. In general, "a substantive statute will not operate retrospectively absent clear legislative intent to the contrary, but a procedural or remedial statute is to operate retrospectively."⁹ In *Metropolitan Dade County v. Chase Federal Housing Corp.*,¹⁰ the Florida Supreme Court noted:

⁷ 281 So.2d 1 (Fla. 1973).

⁸ See *Kluger* at 4.

⁹ *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So.2d 55, 61 (Fla. 1995).

¹⁰ 737 So.2d 494 (Fla. 1999).

Two interrelated inquiries arise when determining whether statutes should be retroactively applied. The first inquiry is one of statutory construction: whether there is clear evidence of legislative intent to apply the statute retrospectively. If the legislation clearly expresses an intent that it apply retroactively, then the second inquiry is whether retroactive application is constitutionally permissible.¹¹

While the Court held that the statute at issue could be applied retroactively, it noted:

[W]e emphasize that a different result might well be reached if these immunity provisions were applied to abrogate a cause of action of a private plaintiff rather than a government entity's cause of action.¹²

In *Department of Transportation v. Knowles*,¹³ the court discussed some of the issues raised by the abrogation of the right to recover damages:

Under due process considerations, a retroactive abrogation of value has generally been deemed impermissible. The rule is not absolute, however, and courts have used a weighing process to balance the considerations permitting or prohibiting an abrogation of value. Despite formulations hinging on categories such as "vested rights" or "remedies," it has been suggested that the weighing process by which courts in fact decide whether to sustain the retroactive application of a statute involves three considerations: the strength of the public interest served by the statute, the extent to which the right affected is abrogated, and the nature of the right affected.¹⁴

To the extent the bill eliminates court actions which may be brought under current law in these situations, and may limit an existing right of value, it is unclear whether the retroactive effects of this bill would survive court scrutiny.

B. RULE-MAKING AUTHORITY:

The bill does not create the need for rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Other Comments - Doctrine of Equitable Estoppel

The doctrine of equitable estoppel precludes a local government from exercising its zoning power where a property owner (1) in good faith (2) upon some act or omission of the government (3) has made such a substantial change in position or has incurred such extensive obligations and expenses that it would be highly inequitable and unjust to destroy the right acquired.¹⁵ This doctrine could normally be raised if there was a judicial determination that the land development regulations are invalid because of a deficiency in the approval standards and the local government was trying to take adverse action related to a previously granted development order.

This bill, however, would make this doctrine inapplicable since the action of the local government in approving the development order under the deficient standards and the subsequent invalidation of those standards would be sufficient to preserve the development order without having good faith or having a substantial change in position or incurring extensive obligations.

¹¹ *Metropolitan Dade County*, 737 So.2d at 499 (citations omitted).

¹² *Id.* at 505.

¹³ 402 So.2d 1155 (Fla. 1981).

¹⁴ *Knowles*, 402 So.2d at 1158 (citations and footnotes omitted).

¹⁵ See, e.g., *Hollywood Beach Hotel Co. v. City of Hollywood*, 329 So.2d 10 (Fla. 1976).

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

On March 3, 2004, the Subcommittee on Local Affairs recommended the adoption of a “strike-everything” amendment to HB 143 which makes the following changes to the language of the bill:

- changes the term “quasi-judicial development order” to “development order;”
- adds a provision requiring that “the timeframe for filing an appeal has expired” for this new subsection to operate;
- changes “the right to commence and complete the development order” to provide that “the development order may not be invalidated;”
- restricts application of the new subsection to that which “is relevant to the development order” as it relates to a portion of the land development regulations being held invalid;
- clarifies that this new subsection is also not meant to affect “any other remedy at law or equity;” and
- limits the retroactivity of the bill to January 1, 2002.

On March 10, 2004, the Committee on Local Government & Veterans’ Affairs adopted this recommended amendment and reported the bill favorably with committee substitute.